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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

~~79~~-1101

No. .....

CATALANO, INC., et al.,

Petitioners,

vs.

TARGET SALES, INC., et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Catalano, Inc., C & C Food Marts, Inc., Neilscarl, Inc., Tollhouse Enterprises, Inc. and Gong, Chun & Young, Inc., on behalf of themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on August 20, 1979.

OPINIONS BELOW

The opinion of Judge Sneed, for himself and Judge Wallace, and the dissenting opinion of Judge Blumenfeld[1] (Appendix A) are reported at 605 F.2d 1097. The order denying petitioners' petition for rehearing and suggestion

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1. Honorable M. Joseph Blumenfeld, Senior District Judge for the District of Connecticut, sitting by designation.

for rehearing in banc (Appendix B) is not reported. The initial order of the district court (Appendix C) and the amendment to that order (Appendix D) are not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on August 20, 1979. A timely petition for rehearing and suggestion for rehearing in banc was denied on October 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Petitioners, owners and operators of retail grocery and liquor businesses in the Fresno, California area, purchase beer from respondents, competitors at the wholesale level of beer distribution. Respondents together control the supply of beer in Fresno, doing business under a comprehensive state regulatory scheme which, as a practical matter, eliminates effective price competition at the wholesale level. The regulatory scheme leaves largely undisturbed competition with respect to credit terms. But such competition in the Fresno area was abruptly terminated in late 1967 when respondents met secretly and agreed to a concerted elimination of trade credit, resulting in an effective increase in the wholesale price of beer.

The Ninth Circuit held, 2 to 1, that this horizontal conspiracy to eliminate trade credit was not a *per se* violation of the Sherman Act because, according to that court, credit is a "non-price" condition of sale. The question presented by the Ninth Circuit's decision is as follows:

Does an agreement among competitors to eliminate trade credit, effectively increasing the price of goods sold by them, constitute a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1)?

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

The Parties

Petitioners are a class[2] of several hundred businessmen in and around Fresno, California who sell beer at retail. Most are small, independent businessmen, operating grocery and liquor stores.

Respondents[3] are the beer wholesalers in the Fresno area. Individually they compete with each other and, in combination, they control the wholesale supply of beer in Fresno.

The Conspiracy to Eliminate Credit

Respondents operate under a comprehensive regulatory scheme applicable to alcoholic beverages of all types. This regulation works to restrict or eliminate altogether price competition in the wholesale distribution of beer.[4]

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2. The district court certified a class consisting of all Fresno beer retailers who received trade credit from respondents prior to, but not after, the implementation of respondents' conspiracy to eliminate credit.

3. Respondents, each of which engages or did engage in the wholesale distribution of beer in the Fresno, California area, are Target Sales, Inc., Donaghy Sales, Inc., M & T Distributing Company, Frank Diel and Thomas Diel and their partnership, D & D Beverage Company, and Carskaddon Enterprises, Inc.

4. California Business and Professions Code § 25000 *et seq.* Analogous provisions applicable to retail sales of distilled spirits and beer (*Rice v. Alcoholic Beverage Control Appeals Board*, 21

Under California law, producers, wholesalers and brand owners of alcoholic beverages are required to file price lists with the California Department of Alcoholic Beverage Control, listing the retail and wholesale price of goods offered for sale. The prices so "posted" with the Department, once approved, apply to all subsequent transactions, until new prices are posted and approved, and the price lists are published in trade journals. In the case of wholesale prices, goods may only be sold at the posted prices and any sales or purchases at other prices result in fines and/or license suspension or revocation.

As a result of this regulatory scheme, price competition in the wholesale distribution of beer, as a practical matter, has been replaced by state-enforced price fixing. Importantly, however, California law does not preclude competition with respect to every element of price. Beer wholesalers may compete in the terms of credit extended to retailers, so long as such terms do not exceed the 30 and 42-day limits on cost-free credit under California law.[5]

Prior to October 1967, respondents in fact competed with each other with respect to trade credit. That competition permitted beer retailers to obtain cost-free trade credit for periods of from 15 to 30 days. Thus, the effective price—the cost of beer to the retailers—was the "raw" price less the value of the use of their capital during the period in which payment was deferred.

Cal. 3d 431 (1978)), retail sales of wine (*Capiscean Corp. v. Alcoholic Beverage Control Appeals Board,* 87 Cal. App. 3d 996 (1979)) and wholesale sales of wine (*Midcal Aluminum, Inc. v. Rice,* 90 Cal. App. 3d 979 (1979)) have recently been held to violate the Sherman Act. The wine price maintenance provisions are presently before this Court in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, No. 79-97, cert. granted October 1, 1979.

5. California Business and Professions Code § 25509.

Individually, respondents were relatively powerless to effect any substantial change in the competition on credit. A refusal by any one of them to extend credit to petitioners would simply result in a loss of business, as retailers would switch to those wholesalers extending credit. Concerted action, however, could easily alter the competitive situation. Accordingly, in October 1967, respondents embarked upon a course of concerted activity designed to eliminate competition on credit from the market which they collectively controlled.

In a series of secret meetings held in the warehouse of one of them, respondents agreed that all trade credit to beer retailers would be eliminated. To guard against any faithless conspirator seeking to reap a competitive advantage by offering credit in breach of the agreement, respondents drew straws to select which would be the first to eliminate credit and collectively monitored the mailing of notices of the elimination to each of their retailer customers.

Once the agreement went into effect, Fresno beer retailers were faced with a choice of C.O.D. payments or advance deposits of money with respondents. The posted list prices of beer remained unchanged after the conspiracy was implemented and thus the cost to the retailers of obtaining beer increased.

Proceedings Below

THE DISTRICT COURT

Petitioners, on behalf of all retailers harmed by the concerted elimination of credit, brought this action in November 1972. Following conditional certification of a plaintiff class and extensive discovery which established the facts set forth above, petitioners moved for an order that the alleged conspiracy, if proved, would constitute a *per se* violation of Section 1 of the Sherman Act. On September 23,

1976, the district court denied the motion without clearly indicating its view as to the applicability of a *per se* rule. (Appendix C) Subsequently, on April 4, 1977, the order was amended to make clear the district court's conclusion that the alleged conspiracy would not constitute a *per se* violation of Section 1. (Appendix D) Recognizing the significance of the ruling on the subsequent course of the litigation, the district court granted petitioners' motion to certify the issue for interlocutory review pursuant to 28 U.S.C. § 1292(b).

THE COURT OF APPEALS

The Ninth Circuit granted permission to appeal, and the case was heard by a panel consisting of Judges Wallace and Sneed, with District Judge Blumenfeld of the District of Connecticut sitting by designation. By a 2 to 1 decision, the court affirmed. Writing for himself and Judge Wallace, Judge Sneed held that an agreement among competitors to fix credit terms did not amount to indirect price fixing because, according to the court, credit is a "non-price condition of sale."[6] Ignoring the relationship between price and credit in order to characterize credit as "non-price," the majority concluded that agreements fixing non-price aspects of trade either promote or inhibit competition, depending on the circumstances, and thus a *per se* evaluation would be inappropriate.

Judge Blumenfeld, dissenting on the *per se* issue, recognized that credit fixing is simply indirect price fixing. Since "credit is one component of the overall price paid for a product," the elimination of credit results in immediate rather than deferred payment and thus is the equivalent

6. Appendix A at 4. The court also unanimously reversed a summary judgment against two petitioners granted by the district court on the basis of no injury in fact, holding that injury results from an elimination of credit. Appendix A at 7-10.

of a price increase. (Appendix A at 12) Accordingly, Judge Blumenfeld concluded that an agreement among competitors to eliminate credit "fits comfortably within the classic mode of price fixing" and is *per se* illegal. (Appendix A at 14)

A petition for rehearing and suggestion for rehearing in banc was subsequently denied on October 23, 1979. (Appendix B)

REASONS FOR GRANTING THE WRIT

By Summarily Characterizing Credit As a "Non-Price" Condition of Sale, the Court Below Would Insulate Horizontal Agreements to Fix Credit, On Their Face a Tampering With Price Structure, From Effective Enforcement of the Antitrust Laws.

The failure of the court of appeals majority to understand the term "price fixing" in any but the most literal sense, and its unexplained reluctance to implement this Court's repeated injunction that indirect as well as direct price-fixing schemes are *per se* illegal, threaten to work a serious erosion of the Sherman Act's *per se* rule against agreements which, on their face, are destructive of competition. *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978). But it is not simply the majority's misunderstanding of the term "price fixing" which poses that danger, or even the patent error to which that misunderstanding necessarily led. It is instead the implications of that misunderstanding which warrant the exercise of this Court's jurisdiction.

By summarily characterizing credit as a "non-price condition of sale," the majority would shield from effective antitrust enforcement horizontal agreements eliminating competition as to what has become a component of the total cost of acquiring nearly every good or service in this nation. The increasing importance of trade credit to the nation's economy is not in doubt. At year-end 1978, trade debt out-

standing was over $288 billion, 220% greater than a decade ago and representing about 13% of the total Gross National Product for 1978.[7] Participants in the economy, large and small and at every level, rely on the availability of credit. It is, we believe, no overstatement to say that retail businesses could not continue to function without trade credit.

Petitioners do not seek this Court's writ on the basis of any inter-circuit or other conflict. It is precisely the absence of any squarely on-point authority which lends urgency to this petition. The opinion below implicitly proclaims itself the one authoritative discussion of the proper treatment of pure credit fixing under the antitrust laws. It has already been extensively noted[8] and further comment is expected by the academic community, members of which have expressed interest in reviewing the record below. In the absence of the exercise of this Court's jurisdiction, the erroneous and confused majority opinion will stand as the highest authority on a question of vital and increasing importance.

To note the absence of authority on pure credit fixing, however, is not to say that the relationship of price and credit has not been the object of some comment, both by commentators[9] and by this Court.

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7. Flow of Funds Accounts (2nd Quarter 1979), Division of Research and Statistics, Board of Governors of the Federal Reserve System (August 1979); Economic Indicators (October 1979), U.S. Government Printing Office.

8. 48 U.S. Law Week 2169 (Sept. 11, 1979); 930 *Antitrust & Trade Reg. Rep. (BNA)* at A.6 (Sept. 13, 1979).

9. See *P. Areeda, Antitrust Analysis* 878 (2d ed. 1974) ("To charge cash and credit customers the same price is, economically speaking, to discriminate against the former."); see also *Lamb and Shields, Trade Association Law and Practice* 129 (1971 ed.) (recognizing that credit terms "are increasingly viewed as elements of price" and assuming that credit fixing is illegal *per se* under the Sherman Act).

In the *Fortner* cases,[10] the price-credit relationship was explored at length. At issue in *Fortner* was whether a seller's offer of low cost credit, unavailable unless accepted with overpriced building materials, represented an unlawful tying arrangement. In *Fortner I,* the majority, in discussing whether credit is a separate product, recognized that credit in the usual case is part of the price:

> In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product. 394 U.S. at 507.

Finding no basis to exempt credit as the source of leverage in a tying arrangement, the case was returned for trial. The dissenters in *Fortner I* made clear their view that low-cost credit was "functionally equivalent" to a price reduction and that the offer of favorable credit terms was merely a "price cut in one form rather than another." 394 U.S. at 515. In *Fortner II,* that view became law, as this Court found that the low-cost credit involved there was merely a vehicle for price competition.

Conspiratorial agreements that involve credit fixing in part are not new to the law. In both *Plymouth Dealers' Association of Northern California v. United States,* 279 F. 2d 128 (9th Cir. 1960) and *Wall Products Co. v. Northern Gypsum Co.,* 326 F. Supp. 295 (N.D. Cal. 1971), such schemes were characterized as *per se* violations of Section 1.

The court below simply ignored *Fortner I and II.* Further, it distinguished the earlier Ninth Circuit authorities, assert-

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10. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) [*Fortner I*]; *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) [*Fortner II*].

ing that where a credit-fixing scheme takes place in the context of "an overall scheme to restrain competition," the anticompetitive impact is more apparent than where the credit-fixing scheme is independent. (Appendix A at 4)[11]

The majority opinion makes bad law based on faulty economics. If one accepts the proposition that "credit fixing" is not "price fixing" (direct or indirect), but instead some new commercial practice with which the antitrust laws have had no experience, it would seem appropriate to equate that practice with blanket licensing of copyrights,[12] or exchanges of price information,[13] and therefore require a case-by-case analysis. But no elaborate inquiry is necessary to determine the anticompetitive consequences of a horizontal credit-fixing conspiracy, as if the price-credit relationship or respondents' agreement were novel or ambiguous.

The relationship between price and credit is a familiar one. As Judge Blumenfeld noted in dissent, the cost to a retailer consists of the price he has to pay and the date when that price must be paid. A retailer who buys on credit pays less than one who buys for cash and thus the elimination of credit "is the equivalent of a price increase." (Appendix A at 12)

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11. The majority acknowledged that an agreement to fix credit terms would amount to price fixing where "competition with respect to price primarily centered on credit terms, as where, for example, explicit prices are fixed by government." (Appendix A at 5) As Judge Blumenfeld noted, here the "limits to competition on price" as a result of the regulatory scheme, coupled with the near fungibility of beer, result in a market in which "competition between wholesalers in extending credit takes on greater importance as a method by which wholesalers can effectively lower the price of beer in order to compete for the business of retailers." (Appendix A at 12-13)

12. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, ... U.S. ....., 99 S. Ct. 1551 (1979).

13. *United States v. United Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

There is here nothing that suggests the necessity of a rule-of-reason analysis. No elaborate study of this industry is necessary to determine the anticompetitive nature of the agreement and no business necessity or excuse suggests itself.[14] As Judge Blumenfeld recognized, the conspiracy here "was a naked agreement among competitors to fix credit—a restraint which serves no economic purpose other than to affect prices." (Appendix A at 13)

The inevitable consequence of respondents' actions was a tampering with price. Assembling in secret meetings, respondents agreed on concerted action fixing the purchase terms of wholesale beer in order to increase their profits—by an effective price increase—at petitioners' expense. This is hardly the sort of conduct with which the antitrust laws have had no experience but instead precisely that type of conduct which gave rise to the *per se* rule in the first instance.

In light of the obligation of the courts to probe behind labels in order to strike down indirect price-fixing agreements, the majority opinion emerges as nothing more than exalting form over substance. Only by an *ipse dixit* assertion that credit is a "non-price" condition of sale was the majority able to resist the conclusion that an agreement to fix credit terms represents price fixing.

This Court reaffirmed two terms ago in *Professional Engineers* that competition, not agreement, on all parts of a bargain lies at the heart of the Sherman Act:

14. The concerted elimination of credit here cannot be excused on the basis of the need to control bad debts. Petitioners are precisely those who present no risk of non-payment, inasmuch as they were each extended credit prior to the implementation of the conspiracy. They are by definition "creditworthy." As relevant to any "business excuse," it is one thing for a single wholesaler, acting independently, to restrict or eliminate credit for particular delinquent retailers but quite another for all competitors to agree on an across-the-board elimination.

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. 435 U.S. at 695.

Should the decision of the majority be permitted to stand, the law will be to the contrary, and the "emasculation" of the Act feared by this Court in *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940), will become a reality for agreements affecting a component of price which, in today's economy, has become nearly as important as price itself.

CONCLUSION

For the above reasons, petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

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United States Court of Appeals
For the Ninth Circuit

Nos. 77-2221, 77-2222

CATALANO, INC., et al., on behalf of themselves and all others similarly situated,

Plaintiff-Appellants,

vs.

TARGET SALES, INC., et al.,

Defendant-Appellees.

OPINION

Appeal from the United States District Court
for the Eastern District of California

Before: WALLACE and SNEED, Circuit Judges, and BLUMENFELD*, District Judge

SNEED, Circuit Judge:

Plaintiffs, a conditionally certified class of beer retailers doing business within the Fresno area, appeal from a ruling that defendants' alleged credit fixing agreement was not *per se* illegal, but rather must be proven illegal under the rule of reason standard. Catalano, Inc. and C & C Food Marts, Inc. (hereinafter Catalano), two named plaintiffs, also appeal from a summary judgment of the district court adjudging that neither plaintiff had suffered injury in fact. Both appeals were consolidated. We affirm the district court's ruling that credit fixing, standing alone, was not an agreement to fix prices subject to a *per se* rule of illegality.

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*Honorable M. Joseph Blumenfeld, Senior District Judge for the District of Connecticut, sitting by designation.

We reverse the district court's entry of summary judgment against Catalano and remand Catalano's claim for further proceedings.

I. FACTUAL BACKGROUND

Plaintiffs-appellants claim that defendants-appellees, various beer wholesalers, have engaged in a conspiracy to restrain trade violative of section 1 of the Sherman Act.[1] The class of plaintiff retailers sought to establish, *inter alia,* that the defendant wholesalers conspired to eliminate deferred payment terms, specifically short term trade credit formerly granted to them on beer purchases.[2]

Plaintiffs sought an order from the district court declaring the alleged credit fixing agreement, if proven, violative *per se* of the antitrust laws. The district court refused to so rule. Plaintiffs then sought an interlocutory appeal from the district court's ruling on the *per se* issue pursuant to 28 U.S.C. § 1292(b). The district court properly certified the issue and we granted permission to appeal.

Contemporaneous with the request for the order declaring credit fixing a *per se* violation, defendants sought a motion for summary judgment against plaintiffs Catalano asserting that they failed to establish injury in fact. The district court agreed, granted the motion for summary judgment, and Catalano appealed therefrom.

We granted a motion to consolidate the two appeals.

II. QUESTIONS PRESENTED

Two issues are presented by these appeals. First, did the district court err by ruling that a horizontal agreement among wholesalers to eliminate credit on retail sales would

1. 15 U.S.C. § 1.

2. The district court conditionally certified plaintiffs' class to include those retailers to whom the wholesalers extended credit prior to the alleged agreement to terminate the credit provisions.

not constitute a *per se* violation of the antitrust laws? Second, did the district court err by granting summary judgment against plaintiffs Catalano on the ground that they failed to demonstrate the existence of any injury in fact? We shall turn first to the *per se* issue.

III. THE PER SE ISSUE

To support their contention that an alleged horizontal agreement among beer distributors to eliminate formerly free short term trade credit should be considered as illegal *per se,* plaintiffs argue that: (1) Price fixing is subject to a *per se* evaluation under the Sherman Act.[3] (2) Under the pertinent standard price fixing may be accomplished directly or indirectly.[4] (3) An agreement to fix credit terms fixes prices indirectly. (4) As a result, credit fixing is a *per se* violation of the antitrust laws.

We cannot agree that on this record an agreement to fix credit terms amounts to indirect price fixing within the meaning of the antitrust laws. *Northern Pacific Ry. v. United States,* 356 U.S. 1, 5 (1958), established the rationale for *per se* illegality in antitrust suits: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Particular acts, of which price fixing is one, have been held so plainly anti-competitive as to be conclusively presumed illegal. The fixing of credit terms, on the other hand, is not

3. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

4. Plymouth Dealers Assoc. v. United States, 279 F.2d 128 (9th Cir. 1960); National Macaroni Mfrs. Assoc. v. Federal Trade Commission, 345 F.2d 421 (7th Cir. 1965).

"manifestly anticompetitive." An agreement to fix credit, a "non-price" condition of sale, may actually enhance competition. Proper analysis reveals "that an agreement fixing non-price trade items may either help or hurt competition, depending upon industry structure." L. Sullivan, *Handbook of the Law of Antitrust,* § 99, at 277 (1977).[5] Thus, an agreement to eliminate credit could sharpen competition with respect to price by removing a barrier perceived by some sellers to market entry. Moreover, competition could be fostered by the increased visibility of price made possible by the agreement to eliminate credit. For example, an agreement to eliminate credit might foster competition by increasing the visibility of the price term, and hence, promote open price competition in an industry in which imperfect information shielded various sellers from vigorous competition.

We readily acknowledge that an agreement to fix credit may be in violation of the antitrust laws when made pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition. *See Arizona v. Cook Paint & Varnish Co.,* 391 F. Supp. 962, 966 n.2 (D. Ariz. 1975), *aff'd,* 541 F.2d 226 (9th Cir. 1976); *Wall Products*

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> The effects of an agreement standardizing non-price terms will vary much as will an agreement standardizing product. By such standardization the variety of offerings open to buyers and competitive differentiation open to sellers will inevitably be reduced, as they are when the product is standardized. . . . But the standardization of non-price terms, like standardization of product will have other effects. It will in a sense serve to channel all transactions into a single, better integrated market; buyers will more easily be able to compare their alternative opportunities as to the unstandardized terms, most notably price, and sellers will more likely be aware of competitive offerings.

L. Sullivan, *supra,* § 99, at 277-78.

Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971). Thus, were competition with respect to price primarily centered on credit terms, as where, for example, explicit prices are fixed by government, an agreement to fix credit terms would amount to price fixing. And, of course, an agreement to fix credit terms as part of an effort to fix prices would contravene the antitrust law.

At this juncture of the proceeding it has not been established that the agreement was entered into with the purpose, or had the effect, of restraining price competition in the industry. Simply labeling concerted conduct as price fixing without proof of purpose to affect price will not justify application of a *per se* rule. "The antitrust laws concern substance, not form, in the preservation of competition." L. Sullivan, *supra,* § 74, at 198. As a result, we refuse to characterize the credit fixing agreement here before us as price fixing.

Our conclusion is reinforced when we consider the function of *per se* rules in antitrust law enforcement. A particular practice which is established as *inherently* anticompetitive eliminates the need for elaborate analysis and may be deemed illegal *per se.* Determination of the applicability of *per se* illegality turns on whether the practice "appears to be one that would always or almost always tend to restrict and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more rather than less competitive.'" *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* ..... U.S. ....., ..., 99 S. Ct. 1551, 1562 (1979); *United States v. United Gypsum Co.,* 438 U.S. 422, 441 n.16 (1978); *see Continental T.V., Inc. v. GTE Sylvania,* 433 U.S. 36, 50 n.16 (1977); *Northern Pacific Ry. v. United States,* 356 U.S. 1, 4 (1958). We cannot say that credit term fixing "would always or almost

always tend to restrict and decrease output." It is better, we believe, to rest an antitrust violation on demonstrable economic effects rather than "formalistic line drawing." *Continental T.V., Inc. v. GTE Sylvania, supra,* 433 U.S. at 59. Thus, to determine the legality of credit fixing an evaluation of the competitive detriment or enhancement must be made in each situation.

Application of the rule of reason, however, does not necessitate invariably the conclusion that a horizontal agreement to eliminate trade credit is lawful. Under the rule of reason any concerted action violates the Sherman Act if its purpose or effect would significantly impair competition. The rule of reason, moreover, "does not open the field of antitrust inquiry to any argument that may fall within the realm of reason." *National Society of Professional Engineers v. United States,* 435 U.S. 679, 688 (1978). It requires examination of the impact of credit fixing on competitive conditions, and such an agreement can benefit competition only if it improves the operation of the market. L. Sullivan, *supra,* § 100, at 280.

Any argument that the special characteristics of the beer industry render monopolistic arrangements better for trade and commerce than competition is foreclosed. *National Society of Professional Engineers v. United States, supra,* 435 at 689.

> The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. "The heart of our economic policy long has been faith in the value of competition." *Standard Oil Co. v. F.T.C.,* 340 U.S. 231, 248. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

Id. at 695. The underlying premise is that "unless the market is rigged, either by concerted agreement . . . or by excessive concentration and interdependent action, the market when left alone ought to adjust to consumer interests with responses at least as fine as those which the industry could concertedly agree upon." L. Sullivan, *supra,* § 100, at 281.

Application of the rule of reason to the facts presented here may be unlikely to require an elaborate inquiry into the effects on the beer industry. A horizontal agreement among distributors eliminating deferred payment terms, while leaving all other terms subject to competitive forces, may well be unreasonable. Such an agreement tends to impair competition. The ease with which the rule of reason may be applied in this case does not, however, justify the invocation of a *per se* rule. We must remain open to the possibility that situations will occur where such an agreement might work to increase competition. *See id., supra,* § 100, at 281.

IV. SUMMARY JUDGMENT

Turning to the summary judgment against Catalano, we note that under Fed. R. Civ. P. 56(c) "[t]he burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact, and, in determining whether the burden has been met, . . . [the court] must draw all inferences of fact against the movant and in favor of the party opposing the motion." *Calnetics, Corp. v.*

Volkswagen of America, Inc., 532 F.2d 674, 683 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976). Once it appears from the movant's papers that the motion should be granted, the opposing party must controvert the showing. All evidence and inferences are to be viewed in a light most favorable to the party opposing the motion. *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). In the antitrust context the general standards for the granting of summary judgment are applied even more stringently. *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

The district court concluded that the cessation of credit on wholesale distribution caused no injury in fact to plaintiffs. Summary judgment against plaintiffs Catalano was based upon a determination that there was no genuine issue of material fact regarding the injury issue. This, in turn, rested upon the deposition of Joseph Catalano, principal owner of the two Catalano businesses. He stated that, except for the possibility of selling more beer, paying cash for beer had no effect on profit and loss. Also, he could not estimate how much more profit might have been made had beer been sold on credit.

Opposing the motion, plaintiffs also relied on Catalano's deposition. They contended that the fact that Catalano could have sold more beer but for the cutoff of credit presented a material issue. Additionally, they relied on a subsequent affidavit in which Catalano testified:

> Both of my companies have always kept more money in checking accounts than absolutely necessary . . . . When defendants cut off credit, some of this money had to be put into beer inventory. As a result, my companies were less liquid than they were before . . . . [T]hey deprived my companies of the opportunity to put that money in time deposits, where it would have drawn interest . . . .

Plaintiffs further controverted the motion with testimony of an expert witness in the field of finance. He stated that a termination of trade credit has an adverse effect on *any* business. "[I]f the company finances the inventories . . . by drawing down its cash reserves, the firm's liquidity and its financial strength are reduced resulting in a decrease in the value of the enterprise." In sum, he was of the opinion that plaintiffs suffered financial injury as a result of the agreement to end credit.

The district court reasoned that because Catalano could not specify how much more beer might have been sold, or how much profit might have been made, he suffered no injury. The court also rejected the claim that an injury can be suffered when surplus cash is utilized to finance inventories even though such use is accompanied by no borrowing or investment of additional cash. The district court erred. It failed to distinguish between the existence of an injury in fact and the means by which the amount of damage can be measured.

Plaintiffs' inability to fix the amount of lost profits bears directly on the issue of amount of damages rather than the existence of an injury. Catalano's inability to estimate his damages does not mean that they were not suffered; nor does it bar an antitrust suit. *Bosgosian v. Gulf Oil Corp.*, 393 F. Supp. 1046, 1050 n.7 (E.D. Pa. 1975).

The plaintiffs made a sufficient showing of a genuine issue of material fact. The existence of an injury is a material fact sufficiently made a genuine issue by Catalano's claim of lesser sales and the expert witness' testimony that injury did exist.[6] Plaintiffs made an adequate showing of

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6. Plaintiffs allege that the defendants have not reduced the price of beer to reflect the termination of free credit. As a result, the measure of damages for plaintiffs' injury, it is argued, should be equal to the cost of financing the beer inventories. Three different

some damage flowing from the agreement, "inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969), *accord Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811 (9th Cir. 1976).

Affirmed in Part, Reversed and Remanded in Part.

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methods for determining the amount of damages were suggested by plaintiffs: (1) measure the opportunity cost of any new capital that plaintiffs invested in the business; (2) measure the opportunity cost of borrowing outside funds to finance the inventories; or; (3) measure the reduction in the value of plaintiffs' business occasioned by the financing of inventories out of cash on hand, thereby reducing the liquidity of the business. While not specifically sanctioning any of these methods, difficulty in measuring the amount of damages should not preclude plaintiffs from establishing that injury was suffered.

Filed—Aug 20 1979
Emil E. MELFI, Jr. Clerk
U.S. Court of Appeals

CATALANO, INC., et al. v. TARGET SALES, INC., et al.
Nos. 77-2221 and 77-2222

BLUMENFELD, District Judge, (Concurring and Dissenting):

I am in agreement with the decision of the majority reversing the lower court's grant of summary judgment against the plaintiffs on the issue of damages; however, contrary to the majority, I would hold that the alleged horizontal agreement among wholesalers to eliminate credit on sales of beer to retailers constitutes a per se violation of the antitrust laws.

It is clear enough by the citation to *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958),[1] that the majority does not intend to change the established rule of law in antitrust cases that price fixing is a per se violation. *See also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218

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1. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves [is] price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210...."

356 U.S. at 5.

(1940). Although recognizing that price fixing may be accomplished directly or indirectly, the majority finds that the alleged agreement to fix credit terms does not amount to either direct or indirect price fixing. I disagree.

The purchase of goods creates an obligation to pay for them. Credit is one component of the overall price paid for a product. The cost to a retailer of purchasing goods consists of (1) the amount he has to pay to obtain the goods, and (2) the date on which he has to make that payment. If there is a differential between a purchase for cash and one on time, that difference is not interest but part of the price. *See Hogg v. Ruffner,* 66 U.S. (1 Black) 115, 118-19 (1861). Allowing a retailer interest-free short-term credit on beer purchases effectively reduces the price of beer, when compared to a requirement that the retailer pay the same amount immediately in cash; and, conversely, the elimination of free credit is the equivalent of a price increase.[2]

To declare in the instant case that credit is "a 'non-price' condition of sale," as the majority asserts *supra,* is too generalized to be entirely true, and disintegrates when exposed to the economic realities of the beer industry in California. Price competition in the beer industry in California is partially restricted by state law through a system of mandatory territorial restrictions and price posting. *See* Cal Bus. & Prof. Code §§ 25000 *et seq.* While containers vary in material, and contents vary in taste, calories, and sometimes color, beer of one brand is substantially the same as that of another. It is common for retailers to buy and carry in stock for resale different brands from several distributors concurrently. Given the limits to competition

2. The defendants here do not argue that the purchase price of their beer decreased in proportion to the savings they realized from eliminating free short-term credit.

on price and on product desirability, competition between wholesalers in extending credit takes on greater importance as a method by which wholesalers can effectively lower the price of beer in order to compete for the business of retailers. The majority acknowledges that where "competition with respect to price primarily center[s] on credit terms, . . . an agreement to fix credit terms would amount to price fixing." This was a naked agreement among competitors to fix credit—a restraint which serves no economic purpose other than to affect prices. It affects no other functional element in a sale of beer by a distributor to a retailer. I would therefore hold that the alleged agreement is illegal per se. Nearly 40 years ago the Supreme Court stated:

> "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.
>
> ". . . .
>
> "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*"

United States v. Socony-Vacuum Oil Co., supra, 310 U.S. at 221, 223.

The suggestion in the majority opinion that the per se rule cannot be applied without proof that the purpose of

the agreement was to affect prices finds no support in the cases. What the purpose of the defendants was, and what they thought about the wisdom of cutting off credit, is irrelevant. The Supreme Court has recently emphasized:

> "In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so 'plainly anticompetitive,' National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978); Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977), and so often 'lack . . . any redeeming virtue,' Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958), that they are *conclusively presumed illegal without further examination under the rule of reason* generally applied in Sherman Act cases."

Broadcast Music, Inc. v. CBS, Inc., 47 U.S.L.W. 4359, 4361 (U.S. April 17, 1979) (emphasis added). Even in the context of criminal liability under the Sherman Act, the Supreme Court has rejected the claim that a criminal conviction requires a finding of a purpose to produce anticompetitive effects. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 444 & n.21; *United States v. Continental Group, Inc.*, No. 78-2328 (3d Cir., July 20, 1979), Antitrust & Trade Reg. Rep. (BNA), No. 926, E-1, E-9. The agreement among the defendant competitors in the instant case fits comfortably within the classic mode of price fixing, and it is so plainly anticompetitive in its nature and necessary effect that no elaborate study is needed to establish its illegality. *See National Society of Professional Engineers v. United States, supra,* 435 U.S. at 692.[3]

3. Lest we be led to a false conclusion by the use of ambiguous concepts, it is necessary to point out that the statement of the majority that "an agreement to eliminate credit could sharpen competition with respect to price by removing a barrier perceived by some sellers to market entry," is curiously inappropriate in this case. I am quite unpersuaded by this strange assertion, nor do I subscribe to the suggestion that it would justify an agreement to fix prices. No person seeking entry to the beer distributors' market is a party to this case. Furthermore, how another distributor who would abide by the agreement could add to price competition is difficult to understand since the agreement would "cripple [his] freedom . . . and thereby restrain [his] ability to sell in accordance with [his] own judgment." Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951).

Paradoxically, our ruling that the plaintiffs' alleged damages would constitute antitrust injury flowing from the withdrawal of credit under the liberal rule for proving damages gives added weight to the foregoing analysis. We hold that plaintiffs have made "an adequate showing of some damage flowing from the agreement" to terminate credit. How to measure the damage is left unresolved; however, it is clear that the damage claim is derived from the increase in the cost of purchasing beer due to the elimination of free short-term credit. To say that the overall cost of purchasing beer increased as a result of the elimination of credit is functionally the same as saying that the effective price of beer rose for these plaintiffs. Since the alleged agreement to fix credit terms raised the effective price of beer, the alleged agreement amounts to price fixing. As such, the per se rule of illegality should govern this case, and the district court's ruling to the contrary should be reversed.

Appendix B

Filed—OCT 23 1979
Richard H. Deane
Clerk, U.S. Court of
Appeals

United States Court of Appeals
For the Ninth Circuit

Nos. 77-2221, 77-2222

CATALANO, INC., et al., on behalf of themselves and all others similarly situated,
Plaintiff-Appellants,
vs.
TARGET SALES, INC., et al.,
Defendant-Appellees.

ORDER

Before: WALLACE and SNEED, Circuit Judges, and BLUMENFELD*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable M. Joseph Blumenfeld, Senior United States District Judge for the District of Connecticut, sitting by designation.

Appendix C

Original Filed—SEP 23 1976
Clerk, U. S. Dist. Court
Eastern District of California

In the United States District Court
Eastern District of California

No. F-731 Civ.

CATALANO, INC., et al., on behalf of themselves and all others similarly situated,
Plaintiffs,
vs.
TARGET SALES, INC., et al.,
Defendants.

FRANK DIEL and THOMAS DIEL, et al.,
Counterclaimants,
vs.
CATALANO, INC., et al.,
Respondents.

MEMORANDUM AND ORDER

Plaintiffs' motion for preliminary injunction was denied from the bench as plaintiffs have not received credit since 1967 and to require credit now would be disruptive rather than maintaining the status quo. Also, plaintiffs have not established a threat of immediate and irreparable loss or that the remedy at law is not adequate.

Plaintiffs' motion to declare this a case of *per se* illegality is denied as plaintiffs must prove that withdrawal of credit caused some injury to some of the plaintiffs. Although counsel will not be required to have all members of the class testify on the issue of liability, causation and impact must be established for there to be liability.

Plaintiffs' motion for proof of damages to be tried in a representative capacity is denied as individual proof of damages is required in this case as injury cannot be presumed from lack of credit.

Plaintiffs ask the court to reconsider its denial of bifurcation. As long as plaintiffs understand the necessity of establishing causation and impact to establish liability, bifurcation will speed up disposition of this case. Therefore, a separate trial before a jury will first be held on the issue of liability. Assuming plaintiffs are successful in obtaining a jury verdict, perhaps the individual proof of damages of each member of the class can be heard by the court or before a master or established by proof of claim. Defendants' counterclaim will then be heard.

Plaintiffs' motions for deadlines for completing discovery are denied with defendants requested to complete their discovery with all due haste.

Plaintiffs' motions fixing the class and providing for additional letters to corporate counsel are denied as unnecessary and unsubstantiated.

DATED: September 23, 1976.

M. D. Crocker
United States District Judge

Appendix D

ORIGINAL FILED—
APR 4 1977

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Eastern District of California

Civil No. F-731

CATALANO, INC., et al., on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

TARGET SALES, INC., et al.,
Defendants.

FRANK DIEL and THOMAS DIEL, et al.,
Counterclaimants,

vs.

CATALANO, INC., et al.,
Respondents.

ORDER

The application of plaintiffs for certification pursuant to 28 U.S.C. § 1292(b) of the issue as to whether the conduct complained of, if proven, would constitute a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1), being duly heard and good cause appearing.

IT IS HEREBY ORDERED that the Order of this Court, entered herein on September 23, 1976, be and is amended by adding at page 2, line 23 of said Order, as follows:

> "In the opinion of the Court, this order involves a controlling question of law, whether an agreement among competitors to eliminate the extension of trade credit constitutes a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1), as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order will materially advance the ultimate termination of the litigation since this issue is central to the conduct of discovery and trial of this case."

Dated: APR 4 1977

M. D. CROCKER
United States District Court Judge

Supreme Court, U. S.
FILED
FEB 15 1980
MICHAEL RODAK, JR., CLERK

79-1101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 791011

CATALANO, INC., et al.,
Petitioners,

vs.

TARGET SALES, INC., et al.,
Respondents.

BRIEF OF RESPONDENT TARGET SALES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 791011

CATALANO, INC., et al.,

Petitioners,

vs.

TARGET SALES, INC., et al.,

Respondents.

BRIEF OF RESPONDENT TARGET SALES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Respondent Target Sales, Inc., adopts by reference and joins in the brief in opposition to petition for writ of certiorari of respondent Donaghy Sales, Inc. Target Sales urges the following points to underscore Donaghy's argument that the Court of Appeals for the Ninth Circuit correctly affirmed the ruling of the District Court for the Eastern District of California—that an alleged credit fixing agreement, standing alone, is not illegal *per se* but must be proved illegal under the rule of reason; and that no important or special reasons exist for a review of that decision by this Court. *Cf.* Fed.R.Civ.P. 19.

ARGUMENT

1. *The rulings below comport with the procedure approved by this Court in a case of first impression.*

Traditionally, *per se* rules are applied only to conduct which has been tested and found unquestionably to have anticompetitive effects. *See, e.g., United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *Northern Pacific Railway Co. v. United States,* 356 U.S. 1 (1958); *White Motor Co. v. United States,* 372 U.S. 253 (1963); *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977); *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* ___ U.S. ___, 1979-1 Trade Cas. ¶ 62,558 (1979). As this Court explained in *White Motor,* considering for the first time a territorial restriction in a vertical arrangement:

> "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business [citations] and within the 'rule of reason.' We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack any redeeming virtue' (Northern Pac. R. Co. v. United States, supra, p. 5) and therefore should be classified as *per se* violations of the Sherman Act." [372 U.S. at 263.]

The same constraint was articulated when the issue first arose of whether fraud in the procurement of a patent could be a violation of the antitrust laws. In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172, 178 (1965), this Court declared "the area of *per se* illegality is carefully limited. We are reluctant to extend it on the bare pleadings and absent examination of market effect and economic consequences." Again, in *United States v. Topco*

Associates, 405 U.S. 596, 607-608 (1972): "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *GTE Sylvania, supra,* reiterated "that departure from the rule of reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." And most recently, in *Broadcast Music, Inc. v. Columbia Broadcasting System,* ___ U.S. ___, 1979-1 Trade Cas. ¶ 62,558 at 77,242, in prescribing an inquiry on whether the purpose and effect of a challenged practice is to threaten the proper operation of a free market economy, or instead to increase economic efficiency and render markets more rather than less competitive, this Court counseled that:

> "The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, see *National Society of Professional Engineers v. United States,* 435 U.S. 679, 690, 692 (1978), or else we should apply the rule of reason from the start. *That is why the* per se *rule is not employed until after considerable experience with the type of challenge and restraint.*" [___ U.S. ___, n. 33, 1979 Trade Cas., n. 33 at 77,242 (emphasis added).]

2. *There is no reason in this case to depart from recognized procedure by creating*—ad hoc—*a new category of* per se *violation.*

The petition invites this Court to depart from its traditional caution, and to create a new category of *per se* violation on an *ad hoc* basis. We respectfully submit there is no reason to do so.

There is not a single reported instance in which an industry with a substantially C.O.D. policy, standing alone, has been tested "before" and "after"; or such a practice has been examined as to its effect, actual or probable; or the competitive or economic objectives or consequences have been elicited or assessed. *See Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918). Certainly they have not yet been in the proceedings at bar.

There is no evidence in the record that the practice being challenged is likely to cause, or has caused, substantial injury to competition—in the Fresno market or elsewhere. There is no indication that an inquiry to this end in this case will be complex, time-consuming, costly or uncertain. *See United States v. Northern Pacific Ry.*, 356 U.S. 1, 5 (1958). (Indeed, some of the defendants, including Donaghy and the present owner of Target Sales, came to adopt a substantially C.O.D. policy at different times, under different circumstances, for different reasons and, perhaps, with different effect from the other defendants. Each would be entitled in any event to show the absence of an anti-competitive objective or effect.)

There is not a single reported instance in which the economic characteristics (if any) of "credit fixing," standing alone, have been discussed, let alone equated with the fixing of prices.

There is not a single reported instance in which concerted action on credit, of any sort, has been found to violate the antitrust laws without at the same time being part of an overriding conspiracy with a pricefixing objective. *Cf. Wall Products Co. v. National Gypsum Co.*, 326 F.Supp. 295 (N.D. Calif. 1971); *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Plymouth Dealers' Association of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960); *United States v. Allied Florists Association of Illinois*, 1953 Trade Cas. ¶ 67,433 (N.D. Ill. 1953); *United States v. Long Island Sand & Gravel Producers Ass'n*, 1940-1943 Trade Cas. ¶ 56,048 (S.D. N.Y. 1940).

In short: to apply the *per se* rule to the facts of this case would extend the law procedurally—by presuming illegal a commercial practice as to which the courts have had no experience; conceptually—by prejudging a practice without inquiry on purpose or effect; and substantively—by proscribing a pattern of conduct without a correlative, price-fixing purpose.

CONCLUSION

The Court of Appeals clearly considered, and correctly applied, this Court's philosophy on the function of *per se* rules in antitrust enforcement. That being so, and no compelling reasons having been advanced for this Court to change its philosophy, we respectfully submit the petition be denied.

DATED: February 14, 1980.

Respectfully submitted,

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Counsel for Respondent
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TOY AND RYMER

Of Counsel for Respondent
Target Sales, Inc.

FILED
MAR 10 1980
MICHAEL RODAK, JR., CLERK

79-1101

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1011

CATALANO INC., et al.,
Petitioners,

vs.

TARGET SALES INC., et al.,
Respondents.

Brief of Respondents D & D Beverage Co. and M & T Distributing Co. In Opposition to Petition for a Writ of Certiorari

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-1011

CATALANO INC., et al.,
Petitioners,

vs.

TARGET SALES INC., et al.,
Respondents.

Brief of Respondents D & D Beverage Co. and M & T Distributing Co. In Opposition to Petition for a Writ of Certiorari

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Respondents D & D Beverage Co. and M & T Distributing Co. adopt by reference and join in the briefs filed by respondents Donaghy Sales, Inc., and Target Sales, Inc., in opposition to the petition for certiorari. However, in light of the amici curiae briefs filed by the United States and by various states in support of the petition, respondents urge that the following points be particularly considered by this Court in deciding whether to hear this case or not to hear it.

ARGUMENT

A. California's Regulatory Plan Does Not Involve Wholesale Price Maintenance for Beer

Contrary to statements by plaintiff and by amici curiae, wholesale beer pricing in California does not involve governmentally imposed price maintenance. Wholesale beer pricing is not akin to the fair trade schemes condemned by California courts in *Rice v. Alcoholic Beverage Control Appeals Board*, 21 C.A.3d 431 (1978), and *Capiscean Corp. v. Alcoholic Beverage Control Appeals Board*, 87 C.A.3d 996 (1979). Nor is it akin to vinter control of the prices of wholesalers, condemned by this Court a few days ago in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, ... U.S. ....., Docket No. 79-97. As pointed out in the Donaghy brief, the applicable California provisions do not eliminate price competition in wholesale sales of beer. (Please see California *Business & Professions Code* Sections 25000-25004, set forth in Appendix 1 to the Donaghy brief). The sections merely require that wholesalers post a schedule of prices and adhere to the schedule, but the schedule may be amended at any time. Amendments are common. Amendments are dictated by competitive pressures in the market. Amendments are effective 10 days after filing, except that amendments to meet lower competitive prices may be effective immediately.

Petitioner and amici suggest that posted price lists are published in trade journals. Respondents respectfully submit that they have been in the wholesale beer business for many years, and that to the best of their knowledge, price filings by individual beer wholesalers are not and never have been published in any trade journal.

As also pointed out in the Donaghy brief, there is substantial evidence that Fresno beer wholesalers sold beer at differing prices, that price movements were not uniform, and that price competition did exist. However, the real significance of the price schedule annexed to the Donaghy brief is not that there was price competition before the withdrawal of credit in 1967, but rather, that the price competition continued after that time. There is nothing in the record in this case which indicates that the withdrawal of credit affected price competition. There was price competition before the withdrawal, and there continued to be price competition after it. Price changes occur frequently.

B. The Ninth Circuit Followed Guidelines Articulated by This Court

The most compelling reason for not granting certiorari herein is that the Ninth Circuit simply followed the guidelines already articulated by this Court. (*Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097). The rationale of the petitioners and amici herein is that price is credit and credit is price, and accordingly the *per se* rule applies. However, the lesson by this Court in *Broadcast Music, Inc. v. Columbia Broadcast System*, 441 U.S. 1 (1979) is that "literalness is overly simplistic and often overbroad". It seems to us that the rationale of this Court in *Broadcast Music*, as well as in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) is that the *per se* rule is not to be applied blindly, but instead, in light of the economic realities of the marketplace. The economic realities of the Fresno area marketplace are that price competition has continued.

The Ninth Circuit's observations that "competition could be fostered" by the agreement to eliminate credit also coincides with the realities of the marketplace. There is deposition testimony by a beer wholesaler in this case that he and the other wholesalers "were getting slaughtered" by credit losses before credit was withdrawn. There is deposition testimony by another wholesaler (M & T Distributing Co.) that its business could not have survived without withdrawal of credit in the marketplace. In other words, there is substantial evidence in the record that the smaller wholesalers would have disappeared if credit had not been withdrawn.[1] The effect of their disappearance would have lessened competition, pricewise and otherwise.

Credit may be "price", although more likely so in a long-term rather than a short-term setting.[2] Free advertising, free delivery, and free stocking of retailers' shelves also

[1]Two of the smaller wholesalers did subsequently "go under" notwithstanding withdrawal of credit, but they were able to stay alive for approximately five years. One, respondent M & T Distributing Co., was able to survive and is a viable business today.

[2]The record herein includes an analysis of the credit extended by respondent D & D Beverage Co. in 1967. Out of the total of 1,268 businesses to which D & D sold beer in 1967, only 379 businesses, or 29.9% of the total, regularly received credit. The terms of credit varied from 5 to 30 days. Of the 379 businesses which received credit, 269 (71%) received credit for 20 days or less, and 152 (40%) received credit for 15 days or less.

may be "price". But again, depending on the circumstances, the contrary may be true. The flexible approach opted-for by the Ninth Circuit simply reflects this Court's own approach.

Respectfully submitted,
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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979
No. ~~79-1011~~ 79-1101

CATALANO INC., *et al.*,

Petitioners,

vs.

TARGET SALES INC., *et al.*,

Respondents.

Brief of Respondent Donaghy Sales, Inc. in Opposition to Petition for a Writ of Certiorari.

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Brief of Respondent Donaghy Sales, Inc. in Opposition to Petition for a Writ of Certiorari.

Respondent Donaghy Sales, Inc. submits that this cause should not be heard by this Court and submits the following matters and grounds therefor.

I.
Question Presented.

One question, and only one, is presented:

Did the Court of Appeals for the Ninth Circuit err in affirming a ruling of the District Court for the Eastern District of California that a horizontal agreement among Fresno beer wholesalers to eliminate credit on sales to retailers would not constitute a *per se* violation of the antitrust laws but should be tested for legality under the rule of reason?

Since the question arose by reason of a pretrial motion by plaintiffs below for a declaration that such an agreement, if proved, would be illegal *per se* (so that evidence respecting matters relevant to a rule of

reason analysis would be neither required nor admissible at trial), there are no questions as to sufficiency of evidence to prove anything, and there is no evidence from which one can make either a complete rule of reason analysis or the lesser inquiry into effect and purpose of the practice referred to in *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. (Prelim. Print) 1, 19 (1979).

It is also clear that there is no contention that the alleged agreement went beyond or included anything other than the elimination of trade credit in beer sales to retailers. The alleged agreement was *not* part of a scheme to fix prices, divide the market, allocate customers or territories, or otherwise to affect or eliminate competition among the beer wholesalers in any respect other than the extension of credit to retailers.

The issue is whether, as a matter of law and without any analysis whatsoever of purpose or effect, an agreement among beer wholesalers to eliminate trade credit on their respective sales to retailers should be characterized as illegal *per se*.

II.
Argument.

The decision of the Court of Appeals for the Ninth Circuit that the alleged agreement among Fresno beer wholesalers to eliminate trade credit to retailers was not illegal *per se* does not meet *any* of the criteria for review by this Court set forth in Rule 19(1)(b).

A. There Is No Conflict Among Courts of Appeals.

So far as we can determine, this is the *only* decision by a Court of Appeals respecting the legality or illegality of an agreement limited to credit matters; so obviously there is no conflict between this decision and any decision of any other Court of Appeals.

For that matter, there is no conflict between the decision here presented for review and any decision of any other court. Of course, in this case, the Court of Appeals agreed with and affirmed the decision of the District Court for the Eastern District of California. There are only three other reported cases, all in District Courts, which have considered the legality of agreements among competitors substantially limited to establishing credit terms: *United States v. Cincinnati Fruit and Produce Credit Ass'n*, 1956 Trade Cas. ¶68,248 (S.D. Ohio 1956); *United States v. Southern California Wholesale Grocers' Ass'n*, 7 F.2d 944 (S.D. Cal. 1925); and *United States v. Fur Dressers' & Fur Dyers' Ass'n*, 5 F.2d 869 (S.D.N.Y. 1925). In each of those cases, the agreement among competitors was held to be lawful on the facts before the court, and the *Cincinnati Fruit* case rejected the government's contention that the agreement was illegal *per se*. Thus, every Court which has considered the matter has concluded that an agreement among competitors substantially limited to credit either was or could be lawful, and every court that has considered the *per se* question has concluded that such an agreement is *not* illegal *per se*.

B. The Question Presented Does Not Involve State or Territorial Questions.

C. The Question of Federal Law Need Not Be Settled by This Court.

We freely concede that the question presented here has not been decided or settled by this Court, but it does not follow that there is any need for such settlement. As noted in the preceding section, in the entire history of Sherman Act litigation there are only four reported cases, including this one, which involved the legality of an agreement among competitors which was limited to credit. Three of them held (two in 1925 and one in 1956) the agreements to be lawful on the facts. Our case held that the agreement, if proved, might be lawful or unlawful, depending on the facts proved at trial. All of the holdings are consistent. Even though this Court has not spoken to the subject, the law is not unsettled. Furthermore, although the question is of importance to the parties, the infrequency with which it has arisen in the past demonstrates that it is not an important question in the administration of the antitrust laws. There is simply no need at all for this Court to consider or decide the question.

D. The Decision Below Does Not Conflict With Decisions of This Court.

There is no decision of this Court on the question presented by this case.

The decision of the Court of Appeals is entirely consistent with the decisions of this Court respecting the *per se* doctrine in other factual settings.

The most recent case in this Court dealing with the application of the *per se* doctrine was *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S.

(Prelim. Print) 1 (1979). While its facts and the agreements under discussion were entirely different from those presented here, its analysis and discussion confirm the correctness of the analysis and decision of the Court of Appeals and their consistency with the decisions of this Court. In *Broadcast Music*, the Court commenced its discussion of the applicable law as follows:

> "In construing and applying the Sherman Act's ban against contracts, conspiracies and combinations in restraint of trade, the Court has held that certain agreements or practices are so 'plainly anticompetitive,' *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977), and so often 'lack . . . any redeeming virtue,' *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category. But easy labels do not always supply ready answers.
>
> A.
>
> "To the Court of Appeals and CBS, the blanket license involves 'price fixing' in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. But this is not

a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price.' As generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue.' Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (CA6 1898), aff'd, 175 U.S. 211 (1899). Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing.' That will often, but not always, be a simple matter.

"Consequently, as we recognized in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-608 (1972), '[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations. . . .' See *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). We have never examined a practice like this one before; indeed, the Court of Appeals recognized that '[i]n dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*.' 562 F.2d, at 132. And though there has been rather intensive antitrust

scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade."

Id. at 7-10 (footnotes omitted).

The decision of the Court of Appeals is entirely consistent with that approach. It refused to characterize the claimed agreement as "indirect price fixing" (App. A, p. 3) or as "price fixing" on the record before it (App. A, p. 5). It recognized that such an agreement was not manifestly anticompetitive, but could actually enhance competition (App. A, pp. 3-4). It recognized that antitrust violations should rest upon demonstrable economic effects, rather than formalistic line drawing (App. A, p. 4). Although the Court of Appeals did not mention it, it is clear that the courts have not had sufficient experience with agreements limited to credit (and not part of an otherwise illegal scheme) to conclude that they should be illegal *per se*—every court thus far having concluded that the agreement before it was or at least might be lawful. The Court of Appeals considered and correctly applied *all* of the recent decisions of this Court dealing with the *per se* doctrine. There is no need to review that decision.

E. There Was No Departure From Accepted Procedure.

Petitioner's pretrial motion in the trial court for a declaration that the alleged agreement, if proved, would constitute a *per se* violation of the antitrust laws was not well taken, but it was entirely appropriate. If granted it would have obviated the necessity to prepare for and try the rule of reason issues, thus simplifying preparation for all parties and expediting the trial. Although we thought the interlocutory appeal unnecessary, because the law was not uncertain, the

question was certainly a controlling question which met all of the other tests for interlocutory appeal. There was no departure from accepted procedure in either the trial court or the Court of Appeals.

III.
Specific Responses to Matters in the Petition.

There are a number of inaccurate or erroneous statements in the petition. We did not digress to address them in our principal discussion, but pointing out some of them may assist the Court in its analysis, so we do so here.

At page 3 of the petition, respondents assert that the California alcoholic beverage laws and regulations "restrict or eliminate altogether price competition in the wholesale distribution of beer." The "tied house" provisions of the law (Business & Professions Code §§25500-25510) do prohibit ownership by a wholesaler of an interest in a retail license, prohibit the furnishing or lending of money to or guaranteeing financial obligations of a retail licensee, prohibit ownership of the business or equipment of a licensee, prohibit the giving of free goods, rebates, or secret commissions to licensees or price discrimination among licensees, prohibit commercial bribery, and limit the assistance that a wholesaler can give to a licensee by way of advertising materials, beer pumps, promotional activities and services. Section 25509 requires that interest be charged on trade credit outstanding more than 42 days and prohibits credit sales to licensees having outstanding credit of more than 30 days. Beer pricing, however, is regulated by Business & Professions Code §§25000-10. Those sections require each wholesaler of beer to file with the department and post a schedule of

the prices he will charge to retailers and to adhere to those prices. Amendments to the schedule may be filed at any time and are effective 10 days thereafter, except that amendments to meet lower competitive prices may be effective immediately. Copies of sections 25000 and 25001-04 are annexed as "Appendix 1." Contrary to the intimation on page 4 of the petition, there is no provision for approval of any wholesaler's price, and every wholesaler is at liberty to file and post any price he chooses.

At page 4, the petition states that "As a result of this regulatory scheme, price competition in the wholesale distribution of beer, as a practical matter, has been replaced by state-enforced price fixing. As the above discussion indicates, that is simply not true—the state only requires the wholesaler to sell to everyone at the price the wholesaler elected to post, without discrimination, kickbacks, discounts, or secret deals. The only evidence in the record, an affidavit of Thomas G. Diel (Clerk's Transcript pp. 1228-31), with respect to price competition among Fresno beer wholesalers is to the effect that they *did* sell at differing prices, that price movements were not uniform, and that price competition did exist. A copy of the price schedule annexed to that affidavit is annexed as "Appendix 2"—the retail prices in the schedule are the minimum retail prices "posted" by the respective *brewers*.

At page 5, the petition refers to alleged conduct by "respondents" in 1967. While it makes no difference to consideration of the question presented here, the fact is that respondent Donaghy Sales, Inc. commenced business in mid-1969 and did nothing at all in 1967.

On page 2 of the petition, the first paragraph under the heading "Question Presented" is inaccurate and

misleading. As our prior discussion notes, the suggestion that state regulation eliminates effective price competition is contrary to the terms of the law and contrary to the only facts in the record. The statement that "respondents met" is inaccurate, for respondent Donaghy did not then exist. The suggestion that "Respondents together control the supply of beer in Fresno" is misleading. Respondents constitute all of the beer distributors headquartered in Fresno. Each of them is the exclusive distributor of one or more brands of beer in the area. Other brands of beer are available to petitioners and are purchased by some of petitioners from sources other than any respondent. (The second paragraph under "The Parties" at page 3 of the petition is also misleading in this respect.)

At pages 7-8 of the petition, petitioners cite some statistics which were not before the courts below and conclude "that retail business could not continue to function without trade credit." Those statistics show that retail businesses have enjoyed trade credit, but they do not support the conclusions that there would be no retail business without it. Passing the absence of evidence to support the conclusion, the evidence that is in the record and which was before the courts below indicates that at least the Catalano petitioners got along in their businesses just fine without trade credit *for beer,* which is the only credit of direct concern here (App. A, pp. 8-9).

Despite petitioners' assertions to the contrary at page 9 of the petition, the *Fortner* cases are entirely inapposite here. Both *Fortner* opinions consistently treated houses (and their price) and credit as two different things. Neither held price and credit to be the same thing. They had nothing to do with an agreement

among competitors respecting credit, and they had nothing to do with whether any agreement was illegal *per se.*

The suggestion on page 9 of the petition that the *Plymouth Dealers* and *Wall Products* cases there cited characterized agreements to fix credit terms as illegal *per se* is simply wrong, as the Court of Appeals recognized (App. A, pp. 4-5), for in those cases credit was involved only as part of a scheme to fix prices or an overall scheme to restrain competition.

In footnote 11 on page 10, the petition cites Judge Blumenfeld's dissent for "the near fungibility of beer." There being no evidence in the record, Judge Blumenfeld presumably relied on his own taste and experience for his conclusions (App. A, pp. 12-13) that "beer of one brand is substantially the same as that of another. It is common for retailers to buy and carry in stock for resale different brands from several distributors concurrently." And Judge Blumenfeld failed to recognize the inconsistency between the first and second of those conclusions—for if beer were indeed fungible, presumably the profit minded retailer would only stock the one brand on which he received the best deal for the most profit.

On page 11, the petition claims that "respondents agreed on concerted action fixing the purchase terms of wholesale beer in order to increase their profits—by an effective price increase—at petitioners' expense." We have already commented on the inaccuracy of "respondents agreed." Of course, the issue as to the purpose of the alleged agreement has not been tried, and petitioner's conclusion is gratuitous. Furthermore, at least from the wholesaler's standpoint, eliminating credit did *not* result in "an effective price increase."

The amount of money the wholesaler received for the beer—its price—was precisely the same in either event. Elimination of credit could have decreased a wholesaler's costs of operations, but it did not increase his revenues, as a price increase would have done.

In footnote 14 on page 11, petitioners make the astonishing assertion that since petitioners were receiving credit, they are by definition creditworthy and present no risk of non-payment, so elimination of credit could not be justified by a need to control bad debts. If that proposition were so, and everybody who received credit presented no risk of non-payment, then there would never be any bad debt losses by anyone. Nonsense.

IV.
The Brief of Amici Curiae.

The brief for the State of Alabama and 38 other states, but not including California, as *amici curiae* sets forth no fact contained in the record or legal reason why this cause should be heard by this Court.

As with the Petition, there are a number of inaccurate statements contained in the brief of *amici*. For example, *amici* erroneously state at page 6 that credit is the "only price competition" which prevailed at the wholesale level and that the elimination of credit "necessarily had an inflationary impact on the overall price paid" by retailers. The nature of competition under the California alcoholic beverage laws and regulations previously has been discussed and need not be repeated. There is, in addition, nothing in the record to support

the claim that the elimination of credit had any effect at all on retailers generally or on any retailers in particular. The Court of Appeals' reversal of the Summary Judgment against Catalano was not on the basis that Catalano in fact has sustained a compensable injury from the elimination of credit (as stated at page 6 of *amici's* brief) but on the basis that there was a genuine issue of material fact as to this issue (App. A, p. 9).

Similarly, *amici's* statement at page 6 of their Brief that the Court of Appeals' ruling will require an "incredibly complicated and prolonged economic investigation" is contrary to the Court of Appeals' own statement that application of the rule of reason "may be unlikely to require an elaborate inquiry into the effects on the beer industry" in Fresno (App. A, p. 7).

Amici claim at page 6 of their Brief that the Court of Appeals erred because it "failed to analyze the substantive character of the agreement, as required by this Court in *Broadcast Music, Inc. v. Columbia Broadcasting System,* ..... U.S. ....., 99 S.Ct. 1551 (1979)." The Court of Appeals, however, following the mandate of *Broadcast Music,* rejected the invitation to declare the elimination of *per se* credit unlawful without an examination of the substantive purposes and effects of this agreement upon retailers, which evidence is not contained in the record and was not before the Court of Appeals. The error claimed by *amici* simply does not exist.

At pages 9 and 10 of their brief, *amici* twice completely distort the holding of the Court of Appeals by asserting that it held that "a horizontal agreement to fix credit would violate the antitrust laws only

'when made pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition' " (p. 9) and that it held that "a horizontal agreement to raise price by eliminating credit is not unlawful unless it is proven to be 'pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition' ". Of course, the Court of Appeals held no such thing. It acknowledged "that an agreement to fix credit may be in violation of the antitrust laws when made pursuant to a conscious purpose to fix prices or as part of an overall scheme to fix prices" (App. A, p. 4), but it did *not* hold that other agreements to fix credit were necessarily lawful or could not be unlawful. Its holding simply was that, standing alone, an agreement among beer wholesalers to eliminate trade credit to retailers could not be condemned as illegal *per se,* but must be tested under the rule of reason. *Amici's* arguments at pages 9-11 of their brief, being based on their erroneous view of the holding of the Court of Appeals, are as erroneous as their statements of the holding.

Conclusion.

Petitioners and *amici* attempt to create the impression that the issue presented here is an important one of pressing significance and that the opinion of the Court of Appeals will emasculate the antitrust laws by misstating the record, exaggerating the effect of California laws, and misdescribing the cases.

The fact remains and should be apparent that this case does not satisfy any of the requirements for review by this Court. The issue is unusual. The few cases that have addressed it are in entire harmony. The simple holding of the Court of Appeals was that an

agreement among Fresno beer wholesalers to eliminate trade credit on sales of beer to retailers, if proved, cannot be condemned as *per se* illegal. It can hardly emasculate the antitrust laws, for it clearly leaves open the possibility that after trial the agreement may be found to be an unreasonable restraint of trade and illegal. It even leaves open the possibility that, after sufficient experience with such agreements, courts might categorize them as illegal *per se.* The analysis of the Court of Appeals, its refusal to succumb to the temptation of reaching an easy decision by deciding the case on the basis of labels or formalistic line drawing, rather than substance, its refusal to declare the alleged agreement illegal *per se* without any analysis of purpose or effect, and its refusal to condemn a practice as illegal *per se* without adequate experience, all conform precisely to this Court's recent discussions and applications (or non-applications) of the *per se* doctrine. The question was correctly decided by the Court of Appeals, is of substantial interest only to the parties, and is resolved for purposes of this case.

The petition for a writ of certiorari should be denied.

DATED: February 11, 1980.

Respectfully submitted,

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APPENDIX 1.

Business and Professions Code.

§ 25000. Beer price schedules: Filing

Each manufacturer, importer, and wholesaler of beer shall file and thereafter maintain on file with the department, in triplicate and in such form as the department may provide, a written schedule of selling prices charged by the licensee for beer sold and distributed by him to his customers in California, except that the transfer, including the sale, of beer between wholesalers who sell the same brand in package is permitted without filing the schedule of selling prices.

§ 25001. Beer price schedules: Change or modification

The schedule of prices filed may be changed or modified from time to time by the licensee filing it by filing with the department either a new and complete schedule of prices or an amendment thereto of changed or modified prices, as the department may by rule require.

§ 25002. Beer price schedules: Effective date

The first schedule of prices filed by a licensee shall be effective immediately upon filing, but an amendatory schedule or amendments to a prior filed schedule is not effective until ten (10) days after the filing date thereof, except that if any licensee has filed a new schedule or amendments to a prior filed schedule to meet lower posted and filed competing prices in a trade area, and the prices thus posted are not lower than the competing prices sought to be met, the new schedule or amendments shall go into effect immediately if the competing prices are already effective, or at the same time as the competing prices become effective.

§ 25003. Beer price schedules: Public inspection

Filed price schedules shall be subject to public inspection and shall not in any sense be considered confidential. Each filing licensee shall retain in his licensed premises for public inspection a copy of his effective posted and filed schedule.

§ 25004. Departure from schedule by licensee

Upon the filing of an original schedule of prices and after the effective date of any schedule of amendatory prices, all prices therein stated shall be strictly adhered to by the filing licensee, and any departure or variance therefrom by a licensee is a midsemeanor, except that the transfer of beer between wholesalers who sell the same brand in package is permitted without filing the schedule of selling prices. Each sale or transaction involving a violation of posted prices under this chaper is but a single offense or violation of this chapter regardless of the number of articles covered by the sale or transaction.

APPENDIX 2.

FRESNO AREA BEER PRICES

Major Beers — 12 Oz. Cans

Note 1: Meaning of Diagonal Between Prices: Price to left is per-case price by wholesalers to retailers. Price to the right is per-case price by retailers to consumers. Figures in parentheses are retailer's margin.

Date	Budweiser	Coors	Miller	Olympia	Schlitz
2/ 2/71	$4.15/5.40 (1.25)	$3.95/5.16 (1.21)	$4.10/5.28 (1.18)	$3.92/5.16 (1.24)	$3.95/5.16 (1.21)
4/ 2/73	4.15/5.40 (1.25)	3.95/5.16 (1.21)	4.10/5.28 (1.18)	3.91/5.16 (1.25)	3.95/5.16 (1.21)
6/24/74	4.28/5.56 (1.28)	4.23/5.56 (1.33)	4.20/5.56 (1.36)	4.23/5.56 (1.33)	4.25/5.56 (1.31)
7/22/74	4.46/5.80 (1.34)	4.45/5.80 (1.35)	4.40/5.80 (1.40)	4.23/5.56 (1.33)	4.43/5.80 (1.37)
12/20/74	4.63/6.04 (1.41)	4.45/5.80 (1.35)	4.60/6.04 (1.44)	4.39/5.80 (1.41)	4.62/6.04 (1.42)
2/17/75	4.87/6.36 (1.49)	4.85/6.40 (1.55)	4.85/6.36 (1.51)	4.77/6.36 (1.59)	4.62/6.04 (1.42)
12/19/75	5.05/6.60 (1.55)	4.85/6.40 (1.55)	5.00/6.60 (1.60)	4.81/6.36 (1.55)	5.04/6.60 (1.56)

Note 2: Dates appearing above were selected as representative dates.

Note 3: Wholesale prices are set by wholesalers. Retail prices and retailers margins are included as a matter of information. Retail prices are not set by wholesalers.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1101

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vs.

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Respondents.

Reply to Brief of Donaghy Sales, Inc. in Opposition to Certiorari

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Respondent Donaghy Sales, in opposing review by this Court, notes the absence of California from the group of 38 *amici* states, perhaps to imply that California is disinterested in or opposed to review. Any such implication would be wrong.

Appendix 1 to this reply is a February 15, 1980 letter to the Clerk of this Court from Mr. Richard B. Spohn, Director of the California Department of Consumer Affairs, and Mr. Baxter Rice, Director of the California Department of Alcoholic Beverage Control. As the agencies of the Executive Branch of the State of California charged with the

protection of consumer interests of California residents and the regulation of alcoholic beverages, these departments express in this letter their agreement with the 38 *amici* states and the United States that this Court should grant review and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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Appendix 1

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CONSUMER SERVICES AGENCY

EDMUND G. BROWN JR., Governor

[Seal]

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February 15, 1980

Mr. Michael Rodak, Jr.
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United States Supreme Court
1 First Street N.E.
Washington, D.C. 20543

Dear Mr. Rodak:

Catalano, Inc., et al., v.
Target Sales, Inc., et al.,
U. S. Supreme Court No. 79-1101

With respect to the above-entitled matter, we wish to join the 38 state Attorneys General and the Solicitor General of the United States as an amicus curiae in support of the petitioners' position.

We wish to call the court's attention to the important role that we play in antitrust enforcement, the right to

protect California citizens from unreasonable restraints of trade or commerce, and the additional burdens which would be placed upon us should the Circuit Court decisions become law.

As the constitutional and statutory officials responsible for the regulation of alcoholic beverages and the protection of consumer interests of the people of the State of California, we wish to accord the citizens of California the same protection as the people in the other states. Therefore, we request that we be allowed to join as amicus with the petitioner or the states Attorneys General, or the Solicitor General of the United States.

We also wish to inform you that we requested the California Attorney General to file an amicus brief on our behalf, but he declined to do so. We have, therefore, taken this action, as agencies in the Executive Branch of the State of California charged with this public trust.

Sincerely,

/s/ BAXTER RICE
BAXTER RICE
Director
Department of Alcoholic
Beverage Control

/s/ RICHARD B. SPOHN
RICHARD B. SPOHN
Director
Department of Consumer
Affairs

FEB 9 1980

No. 79-1101

In the Supreme Court of the United States

OCTOBER TERM, 1979

CATALANO, INC., ET AL., PETITIONERS

v.

TARGET SALES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1101

CATALANO, INC., ET AL., PETITIONERS

v.

TARGET SALES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The question presented in this case is whether an agreement among competing wholesalers to eliminate cost-free trade credit previously extended to retailers is a form of price fixing illegal per se under Section 1 of the Sherman Act, 15 U.S.C. 1. The proper application of the per se rule against price fixing is a matter of general public importance. It is of especially great interest to the United States. The United States is principally responsible for enforcing Section 1 of the Sherman Act, and more than half of its antitrust cases involve price fixing. See generally *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978).

1. In November 1972, petitioner Catalano and several other beer retailers filed an antitrust complaint against the beer wholesalers in Fresno, California (Pet. App. 2; Pet. 5). They charged that in late 1967 the wholesalers

agreed to sell to retailers only on the basis of advance payment or payment on delivery. *Ibid.* Previously, each wholesaler had permitted certain retailers to tender payment 30 days after delivery without interest, and credit terms for individual retailers varied substantially (Pet. 4). Under the California regulatory scheme then in effect, 30 days was the maximum period for which a wholesaler of alcoholic beverages could extend free credit. Competition among wholesalers took the form of providing free trade credit within this period since California law permitted producers of alcoholic beverages to prescribe ~~wholesale~~ retail prices. See Cal. Bus. & Prof. Code §§ 25509, 25000, 24755(i).[1]

Petitioners contended in the district court that the challenged agreement to eliminate free trade credit was a form of price fixing illegal per se under the Sherman Act (Pet. App. 2). Although it rejected that contention, the district court certified the question under 28 U.S.C. 1292(b) (Pet. App. 17-20).

A divided panel of the court of appeals affirmed (Pet. App. 1-15). The court recognized that an agreement to eliminate trade credit "tends to impair competition" and would be illegal per se if it were part of a broader price

[1]Recently, California's regulatory plan, permitting resale price maintenance for alcoholic beverages, has been challenged on antitrust grounds. In *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 579 P. 2d 476, 146 Cal. Rptr. 585 (1978), the California Supreme Court held that state prohibitions against retail sale of distilled spirits for less than producer-prescribed prices are preempted by the Sherman Act. Retail price maintenance on the sale of wine has met a similar fate. See *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Board*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979). The validity of California's resale price maintenance scheme is currently before this Court in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, No. 79-97 (argued Jan. 16, 1980).

fixing scheme or if "competition with respect to price primarily centered on credit terms" (Pet. App. 7, 4-5). Nonetheless, the court concluded that the agreement did not concern price but rather "a 'non-price' condition of sale," and that the agreement "may actually enhance competition * * * by removing a barrier perceived by some sellers to market entry" or "by increasing the visibility of the price term * * *" (Pet. App. 4). Accordingly, the court of appeals remanded the case for trial under the rule of reason, although it suggested that an extensive inquiry would be unnecessary because the agreement appeared on its face to be anticompetitive (Pet. App. 7).[2]

Judge Blumenfeld dissented, concluding that the challenged horizontal agreement among wholesalers to eliminate free trade credit was plainly anticompetitive and a form of price fixing (Pet. App. 11). He pointed out that interest-free credit effectively reduces the price of beer, and that retailers denied free trade credit by a conspiracy among wholesalers have been forced to pay a higher price (Pet. App. 12). Judge Blumenfeld also noted that the majority's holding that petitioners alleged sufficient financial injury to withstand a summary judgment motion was premised squarely on the fact that the challenged agreement increased the cost of purchasing beer (Pet. App. 15). Thus, the majority's disposition of the summary judgment issue directly contradicted its holding on the price fixing issue. *Ibid.*

[2]The court of appeals also reversed the district court's grant of summary judgment against petitioner Catalano and one of the other plaintiffs. It found that these plaintiffs had adequately alleged financial injury even though the precise amount of damages had not been ascertained.

3. The court of appeals' holding that a conspiracy to eliminate free trade credit is not a form of price fixing is both erroneous and important.

a. This Court established long ago that because the "aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition," such agreements are illegal per se. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927). Since price is the "central nervous system" of our competitive economy, the prohibition against price fixing extends beyond simple agreements to set a specific price. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-224, 226 n.59 (1940). It includes concerted actions which directly or indirectly have the purpose or effect of controlling price—"the machinery employed by a combination for price-fixing is immaterial." *Id.* at 221-224. As the Court has recently emphasized, any "agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), quoting *United States* v. *Container Corp.*, 393 U.S. 333, 337 (1969).

The agreement among wholesalers to eliminate free trade credit, as alleged in petitioners' complaint, is clearly such an illegal agreement. It is elementary that the value of a given payment of money is directly affected by the timing of the payment. The opportunity to defer payment has economic value because funds that are retained rather than immediately disbursed can be put to alternative commercial uses, as reflected by the prevailing interest rate. Thus, the provision of interest-free credit is economically identical to offering a discounted price. The recipient of the credit enjoys use of

the funds in question without cost. Elimination of this element of the quid pro quo is functionally the same as a price increase. See J. Henderson & R. Quandt, *Microeconomic Theory* 228 (1958); W. Nicholson, *Microeconomic Theory* 136 (1972); A. Alchian & W. Allen, *University Economics* 176-177 (1972). Thus, the court of appeals' description of free trade credit as a "nonprice condition" (Pet. App. 4) is contrary to both commercial reality and economic theory.[3]

This Court has recognized that in the usual sale on credit, the credit component is part of the purchase price. See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 507 (1969); see also *id.* at 511, 515 (White, J., dissenting); *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 622 (1977) (Burger, C.J., concurring). The elimination of interest-free credit by conspiratorial agreement is indistinguishable from agreements to eliminate discounts previously afforded to customers—agreements that are illegal per se. See, *e.g.*, *United States* v. *Olympia Provision & Baking Co.*, 282 F. Supp. 819, 828 (S.D.N.Y. 1968), aff'd per curiam, 393 U.S. 480 (1969); *United States* v. *United Liquors Corp.*, 149 F. Supp. 609, 611 (W.D. Tenn. 1956), aff'd per curiam, 352 U.S. 991 (1957).[4]

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[3]The court cited L. Sullivan, *Handbook of the Law of Antitrust* § 99 (1977), as its only authority for characterizing the elimination of interest-free trade credit as a "non-price" condition. However, while the cited text does discuss the possible legality of certain product standardization agreements, it does not suggest that agreements to eliminate interest-free credit are permissible.

[4]The court of appeals had difficulty distinguishing the present case from traditional price fixing cases. It acknowledged that the agreement here in question "tends to impair competition" (Pet. App. 7). It also acknowledged that the agreement would be illegal per se if it were part of a broader price fixing scheme or occurred in an industry where "competition with respect to price primarily centered

b. The erroneous ruling of the court of appeals is one that merits correction by this Court at this time. The per se rule against price fixing agreements has been an important part of antitrust enforcement for more than half a century. It embodies the judgment that certain kinds of agreements are so sure to produce harm to competition that they must be forbidden and that the resources of the courts need not be consumed in evaluating them individually. *United States* v. *Trenton Potteries Co.*, *supra*, 273 U.S. at 397-398. The per se rule extends to all agreements intended to frustrate the setting of price by free market forces (*National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 692), because such naked restraints "always or almost always tend to restrict competition" (*Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979)). This rationale fully applies to horizontal agreements on credit terms, since the opportunity for negotiation concerning credit terms or to offer customers more favorable credit terms is an important element in price competition.

By confusing the law applicable to price fixing, the court of appeals' decision deprives the business community of the clear standard that the per se rule was designed to supply. See *United States* v. *Trenton Potteries Co.*, *supra*, 273 U.S. at 398. Moreover, the court's suggestion that the per se prohibition depends on the extent of other forms of price fixing occurring in conjunction with the challenged agreement to fix credit terms invites the very kind of protracted factual inquiry that this Court rejected in *Trenton Potteries*.

---

on credit terms" (Pet. App. 5). However, the limited scope of a price fixing conspiracy provides no defense. Illegal price fixing agreements "may or may not be aimed at complete elimination of price competition." *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 225 n.59.

The economic importance of the court of appeals' decision is substantial. The decision significantly undermines antitrust protection against conspiracies to fix the terms of trade credit, which, as petitioners point out (Pet. 8), at present exceeds $280 billion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.[5]

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

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[5]The Court may wish to consider summary reversal.

Supreme Court, U. S.
FILED
JAN 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1101

CATALANO, INC.,
ET AL., *Petitioners,*

vs.

TARGET SALES, INC.,
ET AL., *Respondents.*

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, TENNESSEE, TEXAS, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA AS AMICI CURIAE

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INTEREST OF AMICI CURIAE

The States of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and the Commonwealths of Massachusetts, Pennsylvania and Virginia respectfully submit this brief *amici curiae* on a petition for a writ

of certiorari to the United States Court of Appeals for the Ninth Circuit pursuant to Supreme Court Rule 42 (4).

The *amici* states play an important role in antitrust enforcement. They have enacted and enforced laws prohibiting unreasonable restraints of trade or commerce within their borders; those laws are construed consistently with this Court's interpretation of the federal antitrust laws. Congress has recently enhanced this role by empowering the states to sue as *parens patriae* to recover damages for violations of the Sherman Act on behalf of their citizens, 15 U.S.C. § 15(c), and by authorizing substantial appropriations for antitrust enforcement by state attorneys general. 42 U.S.C. § 3701.

The *amici* states also purchase a wide range of goods and services. In 1976 alone, the 50 states and their political subdivisions spent approximately $153.7 billion for goods and services. *Council of State Governments, The Book of the States* 276 (1978-79). Like any purchaser, the states are injured by overcharges resulting from antitrust violations; to redress such injuries they have vigorously prosecuted antitrust actions for monetary and injunctive relief. *See National Association of Attorneys General, State Antitrust Laws and Their Enforcement* (1974).

Accordingly, the *amici* states, in both their sovereign and proprietary capacities, have direct and substantial interests in the standards for enforcement of the antitrust laws against anticompetitive, concerted conduct.

QUESTION PRESENTED

Does an agreement among competitors to eliminate trade credit, effectively increasing the price of goods sold by them, constitute a *per se* violation of section 1 of the Sherman Act, 15 U.S.C. § 1?

STATEMENT OF THE CASE

Petitioners are beer retailers in the Fresno, California area. Respondents are beer wholesalers who together control the market for wholesale beer sales in that area.

Pursuant to California law, the wholesale beer prices respondents charge must be approved by the California Department of Alcoholic Beverage Control. California Business and Professions Code § 25000 *et seq.* Once approved, those wholesale prices are published in trade journals and apply to all wholesale transactions until new prices are filed by the wholesaler and approved by the Department. *Id.* California law also sets 30 and 42-day limits on the free trade credit that may be offered by beer wholesalers. California Business and Professions Code § 25509. As a result of this price regulation, competition between wholesalers has been effectively limited to the short-term trade credit they offer.

Before October 1967, Fresno beer wholesalers competed with each other by offering retailers trade credit deferring payment for periods ranging from 15 to 30 days. In 1967, however, the competing wholesalers allegedly agreed to eliminate short-term trade credit. Petitioners brought this action in November 1972, to

recover for damages incurred as a result of the wholesalers' horizontal conspiracy to eliminate the credit formerly granted to them.

Petitioners sought an order from the district court declaring that the alleged credit-fixing agreement, if proved, would constitute a *per se* violation of section 1 of the Sherman Act. 15 U.S.C. § 1. The district court held that the alleged conspiracy would not constitute a *per se* violation, but certified that determination for interlocutory review pursuant to 28 U.S.C. § 1292(b). At the same time, the district court entered summary judgment against two petitioners on the basis of no injury in fact. Petitioner Catalano appealed from that decision, and the two appeals were consolidated.

In a 2 to 1 decision, the Ninth Circuit affirmed the district court's holding that the alleged conspiracy was not a *per se* violation of section 1 of the Sherman Act. *Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097 (9th Cir. 1979). Characterizing credit as "a 'non-price' condition of sale," the majority held that an agreement among competitors to fix credit terms is not subject to *per se* analysis. 605 F.2d at 1099. At the same time, however, the Court of Appeals found that petitioners had made an adequate showing of damages flowing from the alleged credit-fixing agreement to establish injury in fact and reversed the summary judgment which the district court had entered against certain petitioners. 605 F.2d at 1101-02.

Judge Blumenfeld concurred on the issue of injury in fact, but dissented from the majority's determination of the *per se* issue. 605 F.2d at 1102. He concluded that the alleged agreement to eliminate trade credit was "plainly anticompetitive in its nature

and necessary effect" and should be held unlawful *per se*. 605 F.2d at 1104.

Petitioners' petition for rehearing and suggestion for rehearing en banc were denied on October 23, 1979. A petition for a writ of certiorari was filed in this Court on January 15, 1980.

REASONS FOR GRANTING THE WRIT

A. *The Ninth Circuit's Decision Is in Direct Conflict with The Applicable Decisions of This Court and Other Courts of Appeals.*

1. The Majority Erroneously Assumed That Credit Is Not A Component of Price.

At issue here is a horizontal agreement among wholesalers to eliminate trade credit in a market they control. Both this Court[1] and Congress[2] have long recognized that credit is a component of price. In this case, the existence of a state scheme of mandatory territorial restrictions and price posting made credit especially important as a market variable, and the record shows that prior to their agreement wholesalers had competed for business by lowering the overall prices paid by retailers through the extension of credit.

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[1] *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Hogg v. Ruffner*, 66 U.S. (1 Black) 115, 118-19, 17 L. Ed. 38 (1861).

[2] *E.g.*, 15 U.S.C. § 1601 *et seq.* (Consumer Credit Protection Act). Because money received today is more valuable than the same amount received thirty days later, it is common commercial practice to allow a credit for early payment and to exact interest for a delayed payment. This principle has been recognized in the rules promulgated by this Court with respect to interest on judgments sustained on appeal. Rule 56(a), Rules of Supreme Court; Rule 37, Federal Rules of Appellate Procedure. It has also been recognized in the enactments of Congress. *E.g.*, 16 U.S.C. §§ 6601-6612 (interest allowed on overpayments and underpayments of federal income tax).

The concerted action of the wholesalers eliminating trade credit restrained the only price competition which had prevailed at the wholesale level. Unaccompanied by any lowering of wholesale prices, the elimination of credit necessarily had an inflationary impact on the overall price paid by the retailers. Indeed, this inflationary impact on price is evident from the majority's paradoxical holding that ecomomic damage to the retailers resulted from the wholesalers' concerted elimination of credit. 605 F.2d at 1101-02.

By stating that credit is "a 'non-price' condition of sale," 605 F.2d at 1099, the Court of Appeals defined the term "price fixing" in its most literal and narrow sense and failed to analyze the substantive character of the agreement, as required by this Court in *Broadcast Music, Inc. v. Columbia Broadcasting System,* ___U.S.___, 99 S. Ct. 1551 (1979). In so doing, the majority departed from the standards of antitrust analysis established by this Court and reached a result that is flatly contradicted by the facts of the case, the economic realities of the marketplace, and their own holding that economic injury in fact flowed from the challenged agreement to cut off credit. As Judge Blumenfeld stated in dissent, "This was a naked agreement among competitors to fix credit—a restraint which serves no economic purpose other than

to affect prices." 605 F.2d at 1103 (Blumenfeld, J., dissenting).[3]

2. A Horizontal Conspiracy to Raise Prices by Eliminating Trade Credit Is And Should Be Unlawful *Per Se.*

Under the applicable decisions of this Court and the Courts of Appeals,[4] a horizontal conspiracy to raise prices by eliminating trade credit appropriately lies within the *per se* category. Because of the unique role price plays in our economic system, agreements affecting price among competitors are considered to have "[a] pernicious effect . . . and lack of redeeming virtue [and] are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 5 (1968). *Accord, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* ___U.S.___, 99 S. Ct. 1551, 1562 (1979), *quoting United States v. United States Gypsum Co.,* 438 U.S. 422, 436 n.13 (1978). Thus, since they restrain a key form of competition, horizontal agreements concerning prices are *per se* unlawful. *National Society of Professional Engineers v. United States,* 435 U.S. 679, 690 (1978); *Standard Oil Co. v. United States,* 221 U.S. 1, 52-60 (1910).

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[3] Even if credit were not a component of price, a horizontal agreement among suppliers not to offer credit would be no less anticompetitive. Such an agreement would constitute a concerted refusal to deal, which has long been considered a *per se* violation of the antitrust laws. *Radiant Burners v. Peoples Gas, Light and Coke Co.,* 364 U.S. 656 (1961); *Klors v. Broadway-Hale Stores,* 359 U.S. 207 (1959).

[4] *See* text and cases at page 8 *infra.*

That the agreement in question was to eliminate only one component of price competition does not remove it from the *per se* rule. A horizontal conspiracy to fix, stabilize or raise prices strikes at the central nervous system of the economy whether it is effectuated by an agreed-upon price schedule, *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), a ban on competitive price bids, *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978); *United States v. Texas State Bd. of Public Accountancy,* 592 F.2d 919 (5th Cir.), *cert. denied,* 100 S. Ct. 262 (1979), the purchase of surplus supplies, *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), an agreement that fixes credit terms, *see Plymouth Dealers' Ass'n of Northern California v. United States,* 279 F.2d 128, 134 (9th Cir. 1960), or the elimination of credit terms, *Wall Products Co. v. National Gypsum Co.,* 326 F. Supp. 295 (N.D. Cal. 1971). The harm lies in the agreements' restraining competitors "ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951). Even an agreement which is not "price-fixing as such" but which " 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers v. United States,* 435 U.S. at 692. Thus, an agreement to eliminate short-term credit, which directly bears upon price, is price-fixing within the scope of the *per se* rule.

3. The Ninth Circuit's Decision Departs Radically from The Established Standard for Sherman Act Analysis.

Rather than follow the well-established precedent of this Court and the Courts of Appeals, the majority fashioned its own standard for Sherman Act analysis, ruling that a horizontal agreement to fix credit would violate the antitrust laws only "when made pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition." 605 F.2d at 1100. This Court determined in *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978), that even in a criminal context there is no requirement to show a conscious purpose to fix prices. *Id.* at 444 n.21. Moreover, in *Gypsum* this Court restated the general rule that a Sherman Act violation can be established in a civil action by proof of an anticompetitive effect. *Id.* at 436 n.13. Further, in *National Society of Professional Engineers v. United States* this Court stated that even when it does not fit squarely within the literal definition of price fixing "an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." 435 U.S. at 692-93. Such a radical departure from this Court's rulings on an important question of federal law justifies issuing the writ of certiorari.

B. *The Ninth Circuit's Decision Will Undermine Both State And Private Antitrust Enforcement.*

The incorrect ruling of the Ninth Circuit has generated substantial uncertainty in the field of antitrust enforcement. One principle of antitrust law which had been generally understood before this unfortunate decision is that agreements among competitors on the

prices of their individual products and services are forbidden. The certainty of this rule is more than a judicial aid to antitrust enforcement; the Sherman Act places combinations which tamper with price structures "beyond the pale," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-222 (1940), and this Court has long recognized that any change in that rule must be made by Congress. *Id.* at 222. *Accord, United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489 (1950).

In holding that a horizontal agreement to raise prices by eliminating credit is not unlawful unless it is proven to be "pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition," 605 F.2d at 1100, the Ninth Circuit has invited wholesale violation of the antitrust laws through agreements which fix or eliminate any term of sale but the actual invoice price. Conscientious businessmen acting in good faith will no longer have the benefit of a uniformly applied, easily understood rule forbidding horizontal price agreements. Those injured by such agreements who seek redress under the antitrust laws will face prolonged and expensive litigation. As this Court has long recognized,

> [The] principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an

> inquiry so often wholly fruitless when undertaken. *Northern Pacific Ry. Co. v. United States*, 356 U.S. at 5.

By establishing a burden of proof which requires an "incredibly complicated and prolonged economic investigation" before horizontal restraints on prices are held unlawful, the Court of Appeals' opinion undermines both state and private antitrust enforcement. Case by case adjudication of price restraints based upon the Ninth Circuit's analysis is beyond the resources of both injured private parties and state attorneys general. Consequently, unless the Court of Appeals' decision is reversed, enforcement of the antitrust laws will be significantly undermined.

CONCLUSION

WHEREFORE, the *amici* states respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

DATED this 28th day of January, 1980.

Respectfully submitted,

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